

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ASKEW,

Defendant-Appellant.

UNPUBLISHED

March 1, 2005

No. 249835

Wayne Circuit Court

LC No. 98-007542-01

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of voluntary manslaughter, MCL 750.321. The trial court sentenced defendant to three to fifteen years' imprisonment, with credit for time served. We affirm.

I

The instant appeal stems from defendant's second trial arising from the stabbing death of Shane Venegar. There is no dispute that defendant stabbed Venegar on June 13, 1998, after Venegar followed him into his home. However, the circumstances surrounding the stabbing have been disputed throughout the proceedings. The prosecution maintained that Venegar posed no threat and that defendant invited him into the house, whereupon an argument ensued and defendant stabbed Venegar. The defense argued that defendant acted in self-defense after Venegar threatened to rob and kill him.

Following his first trial in 1999, at which defendant testified on his own behalf, the jury found defendant guilty as charged of second-degree murder. This Court reversed that conviction, concluding that the trial court abused its discretion in excluding defendant's testimony regarding his knowledge of the victim's propensity for violence, and that defendant was denied effective assistance by his counsel's failure to take reasonable steps to locate or call two witnesses whose testimony was favorable to the defense. However, this Court also ruled that the trial court did not clearly err in determining that defendant voluntarily waived his *Miranda* rights in making his statement to police. See *People v Askew*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2003 (Docket No. 225861).

On retrial, defendant was again charged with a single count of second-degree murder, and, following a jury trial, he was convicted of voluntary manslaughter. Defendant now appeals.

II

A

Defendant first argues that the trial court committed error requiring reversal in denying defendant's motion for a continuance in order to allow his shirt to be tested for the presence of his own blood.¹ We disagree.

"This Court reviews a denial of a continuance for an abuse of discretion." *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995). See also *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). An abuse of discretion "exists where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). See also *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). "[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence." *Coy, supra* at 18. See also MCL 768.2; MCR 2.503(D)(1). Factors measuring "good cause" include the following: (1) whether defendant asserted a constitutional right as the basis for that request, (2) whether defendant had a legitimate reason for asserting that right, (3) whether defendant was negligent in asserting his right, and (4) whether defendant had requested previous adjournments. *Id.* See also *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). To prevail on appeal, defendant must also show prejudice resulting from the trial court's abuse of discretion. *Coy, supra* at 18-19; *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000); *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). MCR 2.503(C) provides that an adjournment may be granted on the grounds of the unavailability of evidence only if the court finds that the evidence is material and diligent efforts have been made to produce it. *Jackson, supra* at 276-277.

The record indicates that on the second day of trial, before the presentation of opening arguments, defense counsel alerted the court that defendant had filed a motion with the court in October 2002, during the pendency of his prior appeal and six months before his second trial, requesting testing on his shirt, which was stained with blood and was taken by the police following the stabbing. Defense counsel noted that, at his first trial, defendant testified that the victim had cut him. Defense counsel advised the court that defendant believed that the blood on the shirt was his, which purportedly would bolster his claim that he stabbed the victim in self-defense. The trial court directed the prosecution to determine whether the shirt was still being

¹ In conjunction with this first issue presented in defendant's second appeal, defendant renews his assertion that his statement to police was not voluntarily given. However, as defendant acknowledges, the issue of the voluntariness of his statement was addressed and decided by this Court in his first appeal, and because defendant does not assert any material changes in law or facts, this Court's prior determination that defendant's statement was voluntary constitutes the law of the case. See *Grace v Grace*, 253 Mich App 357, 362-363; 655 NW2d 595 (2002); *People v Mitchell*, 231 Mich App 335, 340; 586 NW2d 119 (1998); *People v Radowick*, 63 Mich App 734, 739; 235 NW2d 28 (1975).

held as evidence and, if so, to inquire whether a blood typing test could be performed before completion of the trial.

At the beginning of the proceedings the next day, the prosecution advised the court that defendant's shirt was still in evidence, but the crime lab no longer did blood typing and, therefore, the shirt would have to be sent to a private lab. The court advised the parties that if they could find a lab that could do the testing overnight, the court would order that the test be paid for as part of the investigation costs. Although defense counsel was able to find a lab to conduct the test, she was not able to do so until the court was closed for the day. Defense counsel advised the court of this the next day; however, at this point, the trial was concluding, and the trial court denied defendant's "last minute" request for a continuance.

Defendant now argues that the trial court abused its discretion in denying his request for a continuance, claiming that he was thereby effectively denied his constitutional right to assert a defense. However, we discern no abuse of discretion under the circumstances.

First, we note that any negligence in not timely requesting a continuance is attributable to defendant. As the prosecution notes, despite the fact that defendant (at his own behest) requested that the blood on his shirt be tested in October 2002, while his first appeal was pending in this Court, this issue was not raised or mentioned again during either of the two pretrial conferences in February 2003. Under the circumstances, the trial court properly concluded that defendant or his attorney should have informed the court at an earlier date about the possibility of blood tests. The delay was crucial because, as noted, the resultant delay required that the shirt be sent to a private firm with a prolonged testing period.

Further, we disagree with defendant's characterization of this claim as one of constitutional dimension, i.e., denial of his constitutional right to present a defense. On the contrary, at trial, defendant had the opportunity to fully develop his self-defense theory through the testimony of witnesses,² and the record indicates that his trial counsel effectively advanced the self-defense theory in her arguments to the jury. Moreover, defendant strategically chose not to, but could have, presented self-defense through his own testimony. Instead, this is, at most, a nonconstitutional evidentiary issue involving defendant's belated attempt to test evidence that had been available since the initiation of the case against him in 1998. Indeed, although defendant alleges on appeal that the results of the testing would reinforce his self-defense theory, such argument is mere speculation; defendant never made an offer of proof to the trial court as to what the testing would show and, apparently, has not tested the shirt since the denial of the continuance. Thus, defendant is unable to give any reliable indication on appeal whether or not a blood typing test would have bolstered his self-defense theory. Consequently, defendant has not established any prejudice from the denial of his continuance because he has not shown that the testing would have even supported his self-defense theory and that denial of a continuance forced him not to testify at trial.

² These witnesses testified as to prior confrontations with the victim and the fact that defendant repeatedly, but unsuccessfully, asked Venegar to leave his house immediately before the stabbing.

Moreover, while there were no eyewitnesses to the altercation between defendant and Venegar, there was testimony that defendant took his shirt off before he entered his home and stabbed the victim. Several officers testified that they did not notice any injuries on defendant, and defendant did not bring the alleged injury to anyone's attention. One Detroit police officer who reported to the scene found the victim lying on the sidewalk and testified as to defendant's excited utterances. This officer also testified that defendant was not wearing a shirt and had no injuries when he encountered him in the living room. Additionally, a Detroit police investigator testified that pictures were taken of defendant with his shirt off at the police station, and the investigator did not believe that defendant was wearing a shirt when she arrived. The investigator testified at trial that she recalled no injuries on defendant, and that if suspects or witnesses do present with injuries, the injuries are photographed by evidence technicians. The investigator further testified that she did not order that tests be conducted on the shirt because defendant had no injuries.

In his statement to police, defendant explained that, approximately an hour to an hour and a half after an earlier confrontation with the victim, he and Venegar were alone inside defendant's house and again started arguing over whether defendant owed Venegar some money. Defendant grabbed Venegar; Venegar slapped defendant and said "the house is ours." Defendant stated that it looked like Venegar was reaching for something, so defendant pulled a knife from his back pocket and stabbed Venegar once in the stomach. Significantly, defendant, in his confession, stated that he never saw Venegar with a weapon: "No, I never seen a weapon, even when he was laying on the ground, I never saw a weapon." Moreover, defendant, in his statement, never mentioned that the victim had cut or injured him in any manner. Therefore, on the basis of this record, we conclude that the error, if any, in the trial court's denial of a continuance was harmless and would not have changed the outcome of the trial.

B

Defendant also argues that the trial court should have granted a continuance based on the breakdown of the attorney-client relationship and defendant's confused state of mind, as purportedly evidenced by his statements that he wanted to testify, but could not, due to the absence of supporting evidence. Defendant asserts that he became confused to the extent that he was not competent to stand trial, and he was unable to assist in his own defense. Defendant further contends that the trial court should have granted a continuance because it should have recognized defendant's incoherence and realized that defendant's failure to testify was not in his own best interest.

Defendant's assertion that he was not mentally competent to proceed is wholly without basis in the record. A defendant is incompetent to stand trial if he is incapable of understanding the nature and object of the proceedings or is incapable of assisting in his own defense in a rational manner. MCL 330.2020(1). Our review of the record reveals absolutely no indication that defendant did not understand the proceedings or that he was incapable of assisting in his own defense. At most, the record indicates a disagreement between defendant and his counsel as to trial strategy and the impact of certain testimony on his defense. Defense counsel explained, on the record, sound and legitimate reasons for her strategy and her advice that defendant not testify. Defendant was then left to make his own decision in the face of that advice, ultimately deciding that he would not take the stand. Defendant cites no authority for his assertion that the

trial court should have interceded and admonished counsel of the need for defendant's testimony. Defendant's argument is therefore without merit.

To the extent that this issue is framed by defendant in terms of ineffective assistance of counsel, this issue was not included in defendant's statement of questions presented. Therefore, this issue is neither preserved nor properly presented for appeal. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, on the record before this Court, *Rodriguez*, *supra* at 38, defendant has failed to establish that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that, but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant contends that it was not sound trial strategy for counsel to advise him not to testify, that counsel should have subpoenaed an expert witness (an optometrist) to testify as to his alleged eye disease, and that counsel failed to locate and obtain the testimony of a witness, Tracy Jackson. However, the record belies defendant's contention that defense counsel did not make reasonable efforts to locate Tracy Jackson, who also was not found for the first trial.³ Counsel advised the trial court that she had hired an investigator, who, despite following leads from various people living in the neighborhood, was unable to find Jackson, an itinerant street person.

Further, "[t]his Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers*, *supra* at 715, citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Decisions as to what evidence to present and whether to call a particular witness are presumed to be matters of trial strategy, and the failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense, i.e., a defense that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Here, the record shows that defendant was not deprived of a substantial defense and that defendant has failed to "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, *supra* at 302. Indeed, his counsel presented his assertion of self-defense throughout the trial, bolstering that claim with defendant's statement to police and the testimony of other witnesses. Because the defense was actually raised, defendant's contention that he was deprived of effective assistance lacks merit. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Moreover, it is clear from the record that defendant understood that he had an absolute right to take the stand if he wished to do so. His decision not to testify was his own, based on a

³ Jackson would have allegedly testified that she was a former girlfriend of the victim and that she told defendant that the victim beat her, causing defendant to believe that the victim was dangerous.

trial strategy to which he originally agreed. Therefore, defense counsel was not ineffective in failing to advise him, against her own judgment and in contravention of this strategy, to take the stand. Surely, defendant and his counsel disagreed about the best strategy for his defense, a fact evident from the beginning of the trial. Still, defendant agreed on the record to pursue counsel's strategy, and while he may be disappointed that this strategy did not result in an acquittal, we find no basis for concluding that defendant was denied effective assistance of counsel.

III

Defendant next argues that the jury's verdict of voluntary manslaughter was against the great weight of the evidence. We disagree. Defendant failed to move for a new trial on this ground. Therefore, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

A verdict is against the great weight of the evidence where the evidence presented at trial preponderates heavily against the verdict and a serious miscarriage of justice would result from allowing the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *Musser, supra* at 218-219. Absent exceptional circumstances, credibility issues are reserved for the jury, and a trial court may not substitute its own view of credibility in deciding a defendant's motion for new trial. *Lemmon, supra* at 642. In general, a question as to the credibility of a witness is not sufficient grounds for granting a new trial, unless the testimony contradicts indisputable facts or laws, is patently incredible or defies physical realities, is so inherently implausible that a reasonable juror could not believe it, or has been seriously impeached and the case is marked by uncertainties and discrepancies, such that there is a real concern that an innocent person may have been convicted. *Id.* at 643-644.

Defendant argues that the testimony of Andriego Cowans was "so fraught with inconsistencies as to be incredible." In support of this assertion, defendant cites inconsistencies between Cowans' prior testimony and statements and his trial testimony. These inconsistencies included Cowans' previous testimony that he and Venegar were looking for defendant, in contrast with his trial testimony that they just stumbled on defendant earlier in the afternoon on the date in question. Defendant cites other inconsistencies in Cowans' testimony; however, all of these differences were pointed out to the jury during cross-examination. Further, these inconsistencies do not rise to the level that would support a reversal of defendant's conviction; Cowans' testimony did not contradict indisputable fact or law, was not patently incredible, did not defy physical realities, and was not so inherently implausible that a reasonable juror could not believe it. Nor was Cowans' testimony so seriously impeached, and the case so marked by uncertainties and discrepancies, that there is a concern that an innocent person may have been convicted. Therefore, the determination of Cowan's credibility was properly left to the jury. *Lemmon, supra* at 643-644.

Defendant offers, at best, only cursory treatment of his remaining assertions that the verdict was against the great weight of the evidence. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). See also *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this

Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.”).

Voluntary manslaughter is defined as a killing, which, though intentional, is committed under the influence of passion or in “the heat of blood” produced by adequate or reasonable provocation and before a reasonable time has elapsed for “the blood to cool; it is a killing that results from temporary excitement induced by adequate provocation rather than from any deliberation or reflection, or from wickedness of heart, cruelty, or recklessness of disposition.” *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). “Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passion.” *Id.* Provocation is not an element of voluntary manslaughter, but, rather, is the circumstance that negates the presence of malice. *Id.* at 536. See also *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). To establish a claim of self-defense, defendant must establish that he honestly and reasonably believed that he was in danger of death or serious bodily harm, that the action he took appeared to be immediately necessary, and that he was not the initial aggressor. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995).

Reviewing the record below, we cannot conclude that the evidence presented at trial clearly weighed in defendant’s favor. In his statement to police, defendant indicated that he stabbed Venegar after Venegar threatened him and slapped him and that he never saw Venegar with a weapon. This was sufficient to allow the jury to find that defendant killed Venegar intentionally and without malice, but in the heat of the moment and without deliberation and reflection, as well as to conclude that defendant did not have a reasonable and honest fear of imminent death or serious injury when he stabbed Venegar. Given these facts, defendant has failed to show plain error affecting his substantial rights. *Musser, supra.*

IV

Defendant next contends that there was insufficient evidence to sustain his conviction for voluntary manslaughter. In determining whether there was sufficient evidence presented to support the verdict, this Court reviews the evidence de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The standard of review is deferential and requires the reviewing court “to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *Id.*

Defendant argues that, had he testified at this trial as he had at the first trial, and had “the jury had the opportunity to consider defendant’s self-defense claim based on all of the available evidence defendant should have presented,” defendant would have been acquitted. Defendant asserts that Cowans’ testimony was incredible, in contrast with defendant’s testimony which presented a credible theory of complete self-defense. Defendant asserts that the jury’s verdict likely represented a compromise, and “[h]ad the jury heard the testimony [defendant] gave in the

first trial, even without Tracy Jackson’s testimony, it is very likely the jury would have acquitted him.”

Defendant does not address the evidence presented at this trial but, rather, addresses all of the “evidence” known to defendant, including his own prior testimony and the potential testimony of Tracy Jackson, which was unobtainable but purportedly would have corroborated defendant’s prior testimony concerning the victim’s propensity for violence. In effect, defendant does not actually argue that the evidence presented against him at his second trial was insufficient to support the verdict; rather, defendant argues that had *different* evidence been presented, the jury would have found that he acted in self-defense and would have acquitted him. As discussed above, “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *Kelly, supra* at 641. Defendant’s stated basis for his sufficiency of the evidence claim is without merit.

In any event, there was sufficient evidence presented at trial to allow a rational trier of fact to find that the essential elements of voluntary manslaughter were proven beyond a reasonable doubt and that defendant did not act in self-defense. As previously noted, in his statement to police, defendant indicated that he stabbed Venegar after Venegar threatened him and slapped him and that he never saw Venegar with a weapon. This was sufficient to allow the jury to find that defendant killed Venegar intentionally and without malice, but in the heat of the moment and without deliberation and reflection, as well as to conclude that defendant did not have a reasonable and honest fear of imminent death or serious injury when he stabbed Venegar. We conclude that the evidence, viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *Nowack, supra; Fennell, supra.*

V

In a subsequently filed standard 11 brief, defendant raises four additional appellate issues. First, defendant argues that he was denied a fair trial by prosecutorial misconduct. Specifically, defendant contends that the prosecutor knowingly relied on the “false and misleading” testimony of a witness, Officer Kroma. In essence, defendant objects to alleged inconsistencies in, or “surprise expanded versions” of, Officer Kroma’s testimony admitted during trial, and he contends that the prosecution was required to bring out these inconsistencies for the benefit of the jury. Moreover, defendant argues that the officer’s prior testimony was so replete with material testimonial inconsistencies that it was virtually impossible for the defense to adequately challenge on cross-examination. We disagree.

A prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). Here, however, the record indicates that while the inconsistencies – minor, if any – between the officer’s trial testimony and his prior statements could, and did, serve as the basis for impeachment by defense counsel, they were not tantamount to prosecutorial misconduct based on the knowing introduction of false testimony. Because defendant’s claim is meritless, his related argument that defense counsel was ineffective in failing to object or properly cross-examine Officer Kroma is similarly without basis in the record. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004); *Toma, supra* at 302-303.

Defendant also argues that the cumulative effect of several alleged errors constitutes sufficient prejudice to warrant reversal of his conviction. A claim of cumulative error warrants reversal “only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial.” *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). However, because we have found no error in defendant’s appellate claims, defendant has failed to demonstrate that the cumulative effect of multiple errors requires a new trial. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002); *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Defendant’s remaining arguments raised in his standard 11 brief are redundant and without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder